justification based on the benefits of free competition,[4] but where one engages in business solely to injure the plaintiff without seeking or expecting personal gain the interference with the plaintiff's business is unjustified,[5] the motive, however, being merely evidence that real competition does not exist. In the second class motive is material in and of itself.[6]

In the principal case the justification is the right to sell property as a necessary incident of beneficial ownership. Assuring to individuals the benefits of ownership is considered so important that motive has always been disregarded; therefore malice is relevant only as it sheds light on whether a real or a pretended sale is contemplated. If a mere pretense, the law's object is not achieved, and the plaintiff's damage is unjustified.[7] But if a real sale is intended, ill-will should not take away the justification.[8]

CONTRACTS RELIEVING FROM LIABILITY FOR NEGLIGENCE. — It is generally admitted that in the absence of special circumstances a contract exempting one from liability for negligence is valid. Moreover, the result is the same whether the negligence is positive or negative in nature, whether the liability arises as a result of personal negligence or by virtue of *respondeat superior*,[1] or whether the damage is to person or property. To that extent the policy in favor of freedom of contract overrides the general objection that such contracts remove an incentive to carefulness.[2]

[4] Passaic Print Works *v.* Ely & Walker Dry Goods Co., 105 Fed. 163 (1900). So also if he is getting a real benefit from a use of his property. Falloon *v.* Schilling, 29 Kan. 292 (1883). In this case the defendant erected cheap dwelling-houses on his land and rented them to negroes in order to influence the plaintiff who lived on adjoining property to sell to him at a low price. Although the defendant's dominant motive was to injure the plaintiff, he was receiving real benefit from the houses and was thus making a beneficial use of his property. The court refused to interfere.

[5] Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946 (1909); Dunshee *v.* The Standard Oil Co., 152 Ia. 618, 132 N. W. 371 (1911). So also where one shoots off guns on his land, not for any benefit to himself but only to frighten the wild fowl away from his neighbor's decoy pond, an action will lie. Keeble *v.* Hickeringill, 11 East, 574 note (1706). The cases holding that no action lies for the erection of fences purely from spite are irreconcilable with the views here expressed, but a respectable minority of well-considered cases hold that such an action is maintainable. For a discussion of the cases involving drainage and spite fences, see Professor Ames's article in 18 HARV. L. REV. 411, 414, 415.

[6] Numerous instances where motive is material are given in 18 HARV. L. REV. 411, 416, 417, 418. To the ones there given may be added the cases involving the enticement of a wife to leave her husband. Bennett *v.* Smith, 21 Barb. (N Y.) 439 (1856); Tasker *v.* Stanley, 153 Mass. 148 (1891).

[7] The court in the principal case says, "If she had put up the sign and had caused the advertisements to be inserted without any intention of selling her property but solely with the purpose of injuring the business and property of the complainants, there can be no doubt that such conduct on her part would have been actionable." Holbrook *v.* Morrison, 100 N. E. 1111. To the same effect are Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946 (1909); Dunshee *v.* The Standard Oil Co., 152 Ia. 618, 132 N. W. 371 (1911).

[8] For general discussions as to the place of motive in the law of torts, see 8 HARV. L. REV. 1; 18 HARV. L. REV. 411; 22 HARV. L. REV. 501.

[1] This distinction is suggested in Little Rock & Ft. S. Ry. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808, and in Blanton *v.* Dold, 109 Mo. 64, 18 S. W. 1149.

[2] Baltimore & O. S. W. R. Co. *v.* Voigt, 176 U. S. 498, 20 Sup. Ct. 385; Dodd *v.*

The question has arisen chiefly, if not entirely, in two classes of cases: contracts between master and servant, and contracts between public-service companies and members of the public. By the weight of authority contracts exempting a master from liability to a servant for negligence are ineffectual.[3] In addition to the general objection to such contracts employees are at a disadvantage practically in negotiating with employers, and their injury without indemnity might lead to increased burdens on the state. Contracts exempting a public-service company from liability to a patron for negligence are almost universally condemned.[4] Such an exemption might result in deterioration of the service. But this consideration is apt to be over-emphasized, for it is well settled that public-service companies may insure against liability for negligence,[5] and in the long run such insurance would seem to have as much tendency to induce careless service as separate contracts of insurance with the patrons. Furthermore, the company has usually sufficient property of its own involved to furnish an incentive to careful service.[6] The controlling reason why such contracts are not enforceable arises from the relation of the parties, as in the master and servant cases. The patron is at a disadvantage, for although the service is necessary the business is monopolistic. The fact that the public-service company might be com-

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Central R. Co. of N. J., 76 Atl. 544 (N. J. L.); Griswold, Adm'r *v.* New York & N. E. R. Co., 53 Conn. 371, 4 Atl. 261; Coup *v.* Wabash, St. L. & P. Ry. Co., 56 Mich. 111, 22 N. W. 215; Mann *v.* Père Marquette R. Co., 135 Mich. 210, 97 N. W. 721; Deming & Co. *v.* Merchants' Cotton-Press & Storage Co., 90 Tenn. 306, 17 S. W. 89.

As observed by Jessel, M. R., in Printing & Numerical Registering Co. *v.* Sampson, L. R. 19 Eq. 462, 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract."

As to the argument of public policy, there is a famous passage by Burrough, J., in Richardson *v.* Mellish, 2 Bing. 229, 252: "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

[3] Johnston *v.* Fargo, 184 N. Y. 379, 77 N. E. 388; Hissong *v.* Richmond & D. R. Co., 91 Ala. 514, 8 So. 776; Atchison, T. & S. F. Ry. Co. *v.* Fronk, 74 Kan. 519, 87 Pac. 698; Roesner, Adm'r *v.* Hermann, 8 Fed. 782. *Contra*, Griffiths *v.* Earl of Dudley, 9 Q. B. D. 357; Western & Atl. R. Co. *v.* Bishop, 50 Ga. 465.

In view of the fact that the cases do not limit the rule to personal negligence, it seems impossible to reconcile it with the fellow-servant rule.

[4] Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; Welch *v.* Boston & A. R. Co., 41 Conn. 333; Illinois Central R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019; Rose *v.* Des Moines Valley R. Co., 39 Ia. 246. *Contra*, Cragin *v.* New York Central R. Co., 51 N. Y. 61.

[5] Phœnix Ins. Co. *v.* Erie & Western Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750; California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365; Trenton Passenger Ry. Co. *v.* Guarantors' Liability Indemnity Co., 60 N. J. L. 246, 37 Atl. 609; American Casualty Insurance Company's Case, 82 Md. 535, 34 Atl. 778. But see Anonymous, 5 Taunt. 605, 606.

[6] By the weight of authority, a public-service company may limit its liability for loss by negligence to a substantial amount. Graves *v.* Lake Shore & M. S. R. Co., 137 Mass. 33; Hart *v.* Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151. *Contra*, Overland Mail & Express Co. *v.* Carroll, 7 Colo. 43, 1 Pac. 682.

pelled to render service without such a stipulation is not regarded as sufficient protection to the patrons from a practical standpoint. Moreover, the law imposes special duties upon the public-service company because of its relation to the public, and so far as these duties are essential to the service they are insisted upon more strictly than general common-law duties.[7]

The importance of the relation between the parties is further illustrated by cases where the company stipulates for exemption from liability for negligence, not as a public-service company, but simply as a member of society. There are two classes of cases. In one, the company does something not only beyond obligation but which increases the risk of loss through negligence, such as leasing part of a railroad's right of way, or operating a private siding. Here the courts are practically unanimous in allowing the exemption.[8] In the other class the company simply owes no duty as a public-service company. For instance, where a railroad contracts with an adjoining property owner for exemption from liability for negligence, although the railroad operates its line as a common carrier, it owes no duties as such to the adjoining property owner. The parties contract as ordinary members of society. There is no danger of overreaching. Furthermore, even conceding that such contracts have a tendency to induce carelessness, as a practical matter the interest of the patrons and of the adjoining property owner usually involve separate considerations. Thus, while the danger from sparks is real to the property owner, it is inappreciable to the patron. Consequently, such contracts are also upheld.[9] A recent case holding the contrary is practically without support on the authorities. *Stoneboro & Chautauqua Lake Ice Co.* v. *Lake Shore & Michigan Southern Ry. Co.*, 86 Atl. 87 (Pa.).

THE DIVISION OF POWERS IN GOVERNMENT. — In 1787 the distinct division of the government into legislative, executive, and judicial powers was regarded as the keystone of the Constitution. It was thought that if liberty could be preserved it would be by these carefully gradu-

[7] The protection accorded to customers of public-service companies and servants is somewhat analogous to the law as to infancy. The respect for relational duties has an analogy in the policy against contracts affecting the duties of parents, or in derogation of the marriage relation. Andrews *v.* Salt, L. R. 8 Ch. 622; Hussey *v.* Whiting, 145 Ind. 580; 44 N. E. 639; Irvin *v.* Irvin, 169 Pa. St. 529, 32 Atl. 445.

[8] Leasing part of a right of way: Griswold *v.* Ill. Central Ry. Co., 90 Ia. 265, 57 N. W. 843; Stephens *v.* So. Pac. R. Co., 109 Cal. 86, 41 Pac. 783; Hartford Fire Ins. Co. *v.* C. M. & St. P. Ry. Co., 175 U. S. 91, 20 Sup. Ct. 33. Operating a private siding: Porter *v.* N. Y., N. H. & H. R. Co., 205 Mass. 590, 91 N. E. 875; Mo., K. & T., Ry. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159; Mayfield *v.* So. Ry., 85 S. C. 165, 67 S. E. 132. For other cases where the company does something beyond its obligation as a public-service company, which involves an increased risk, see 2 WYMAN, PUBLIC-SERVICE CORPORATIONS, §§ 1015, 1018.

[9] Richmond *v.* N. Y., N. H. & H. R. Co., 26 R. I. 225, 58 Atl. 767. In this case a spur had been constructed, but a contract covering negligence in operating the main line was upheld. In Thomason *v.* Kansas City So. Ry. Co., 122 La. 995, 48 So. 432, the court assumed the validity of such a contract, but construed the contract in question as not including negligence on the main line.